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Filing date: **11/10/2006**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	78524961
Applicant	Annie's Homegrown, Inc.
Applied for Mark	FRUIT BUNNIES
Correspondence Address	Mark E. Baron Kirkpatrick & Lockhart Nicholson Graham State Street Financial CenterOne Lincoln Street Boston, MA 02111-2950 UNITED STATES tmboston@kln.com
Submission	Appeal Brief
Attachments	Applicant's Appeals Brief and Request for Oral Hearing.pdf (7 pages)(598018 bytes)
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Date	11/10/2006

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

APPLICANT:	Annie's Homegrown, Inc.
SERIAL NO.:	78/524,961
FILED:	December 1, 2004
MARK:	FRUIT BUNNIES
EXAMINING ATTORNEY:	Brian Pino
LAW OFFICE:	114

**APPLICANT'S APPEAL BRIEF IN SUPPORT OF
REGISTRATION OF FRUIT BUNNIES**

Applicant hereby appeals from the Examining Attorney's final refusals of February 17, 2006 and August 28, 2006 to register the above-identified mark, and Applicant respectfully requests that the Trademark Trial And Appeal Board reverse the Examining Attorney's decision. An oral hearing is requested by separate notice filed concurrently herewith.

Applicant's Trademark

Applicant seeks registration on the Principal Register of its mark: FRUIT BUNNIES for "snack food, namely dehydrated fruit snacks."

Prior Registrations Cited By the Examiner

No prior registrations were cited by the Examining Attorney.

The Rejection

The Examining Attorney has refused registration on the Principal Register under Trademark Act § 2(e)(1), on the grounds that the proposed mark is merely descriptive of the

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identified goods, and that the mark is therefore incapable of identifying Applicant's goods and distinguishing them from those of others.

Argument

The test for descriptiveness is whether or not the mark merely describes an ingredient, quality, characteristic, function, feature, purpose or use of the specified goods or services. The determination of whether or not a mark is merely descriptive must be made in relation to the goods or services for which registration is sought, not in the abstract. Trademark Manual of Examining Procedure (T.M.E.P.) § 1209.01(b).

To be characterized as "descriptive," a term must directly give some reasonably accurate or tolerably distinct knowledge of the characteristics of a product. *Blisscraft of Hollywood v. United Plastics Co.*, 294 F.2d 855, 131 U.S.P.Q. 55 (2d Cir. 1961). The primary reasons for not protecting descriptive marks are to prevent the owner of a mark from inhibiting competition in the sale of particular goods, and to maintain freedom of the public to use the language involved, thus avoiding the possibility of harassing infringement suits by the registrant against others who use the mark when advertising or describing their own products. *See* T.M.E.P. §1209.

In the present case, the goods being sold are dehydrated fruit snacks and the trademark identifying the snacks is FRUIT BUNNIES. This is evident by the description of goods included in the application, which specifically lists international class 30, and further identifies dehydrated fruit snacks as the goods within this class. The Examining Attorney's rejection is not appropriate

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because neither bunnies nor rabbits are the goods with which the mark is associated. The mark FRUIT BUNNIES is not, nor is it alleged to be, descriptive of dehydrated fruit snacks.

Registration of the mark FRUIT BUNNIES certainly would not inhibit competition of the sale of snacks, and would maintain freedom to the public use of the language, since "bunnies" is a term not used to describe such snacks. "Bunnies," in fact, is a fanciful and arbitrary term when used to identify such snacks. It also is noted that Applicant has disclaimed exclusive use of the term "fruit."

The courts examined the question of distinctiveness of animal-shaped food in the case of a cracker in *Nabisco Inc. v. PF Brands Inc.*, 51 U.S.P.Q. 2d 1882 (2d Cir. 1990). The court examined the trademark "Goldfish" owned by Pepperidge Farm, and found the goldfish shape to exhibit distinctiveness. "The fish shape has no logical relationship to a cheese cracker." *See id.* at 1889. The court further held, "In sum, because the use of the goldfish shape has no logical relationship to a bite-sized cheese cracker and for the reasons discussed above, we believe that the Pepperidge Farm's Senior mark is reasonably distinctive." *See id.* at 1890. The issue before the *Nabisco* court is similar to that for Applicant's trademark, and the court there established that an animal-shaped food item is distinctive, and not descriptive.

Applicant submits in further support of its arguments the attached Trademark Registration Number 961,041 for "Barnum's Animal Crackers Nabisco," in which only the descriptive word "cracker" is disclaimed. *See Exhibit A.*

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While the courts and the Patent and Trademark Office have found animal-shaped food to be distinctive enough to merit trademark protection, it is noteworthy that trademark protection for the animal shaped food itself is not being sought. The animal shape of the dehydrated fruit snack is applicant's trade dress. The word mark, FRUIT BUNNIES, identifies the Applicant's trade dress, further strengthening its trade dress.

The word mark FRUIT BUNNIES therefore is being rejected for describing applicant's trade dress. The Examining Attorney, in fact, did not reject the application until Applicant identified the snacks to be bunny-shaped. To hold FRUIT BUNNIES unregistrable is essentially penalizing Applicant for utilizing its trade dress to further distinguish its product, and is contrary to principles of established trademark law. There is no support for the proposition that a word mark may not in some way describe a product's trade dress.

The term FRUIT BUNNIES, therefore, is not descriptive of dehydrated fruit snacks, and the composite term FRUIT BUNNIES creates a unique non-descriptive mark when used to identify dehydrated fruit snacks. The shape of the fruit snacks is also a trade dress of Applicant, and as such should not be used to prevent registration for a word mark covering snack food.

Conclusion

In conclusion, Applicant's trademark FRUIT BUNNIES is not merely descriptive of the recited products. The evidence of record does not compel a conclusion that the mark is merely descriptive for this class of goods, and is instead indicative of the acquired distinctiveness of

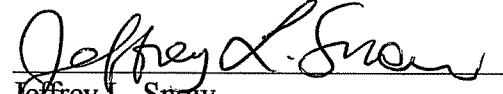
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Applicant's mark. Therefore, Applicant's mark should not be refused registration on the ground of being merely descriptive.

Respectfully submitted,


Jeffrey L. Snow

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Date: November 10, 2006

Int. Cl.: 30

Prior U.S. Cl.: 46

United States Patent and Trademark Office

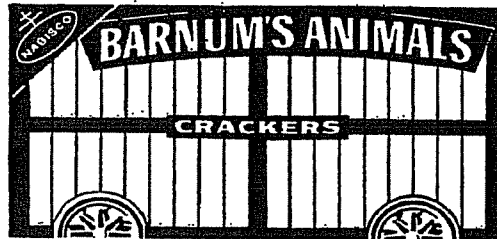
10 Year Renewal

Reg. No. 961,041

Registered June 12, 1973

Renewal Term Begins June 12, 1993

TRADEMARK
PRINCIPAL REGISTER



NABISCO, INC. (NEW JERSEY CORPORATION)
7 CAMPUS DRIVE
PARSIPPANY, NJ 070540311

OWNER OF U.S. REG. NOS. 37,299,
900,286 AND OTHERS.

APPLICANT DISCLAIMS THE EX-
CLUSIVE USE OF THE WORD "CRACK-

ER" APART FROM THE MARK AS
SHOWN.

FOR: CRACKERS, IN CLASS 46 (INT.
CL. 30).

FIRST USE 0-0-1920; IN COMMERCE
0-0-1920.

SER. NO. 72-419,544, FILED 3-27-1972.

*In testimony whereof I have hereunto set my hand
and caused the seal of The Patent and Trademark
Office to be affixed on Aug. 24, 1993.*

COMMISSIONER OF PATENTS AND TRADEMARKS

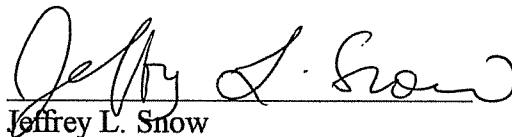
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APPLICANT'S REQUEST FOR ORAL HEARING

Applicant, pursuant to Trademark Rule 2.142(e)(1), hereby requests thatn an oral hearing be granted in connection with the appeal filed in the above-identified application.

Respectfully submitted,



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Date: November 10, 2006